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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1297

EMERSON ELECTRIC CO., U. S. ELECTRICAL MOTORS, INC., BEN HARDWICK, TRAVIS CHEATHAM and JERRY PALMER,
Petitioners,

v.

J. R. FULTON, HUBERT LOVERN, PAT GREEN, R. B. ROBERTSON, ALONZO DAVIS, LESTER LONG, ALTON COLE, OLYN COWARD and CLIFTON McDONALD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Emerson Electric Co., U. S. Electrical Motors, Inc., Ben Hardwick, Travis Cheatham, and Jerry Palmer, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered December 22, 1969, which reversed the judgment entered in favor of peti-

tioners and against respondents by the United States District Court for the Southern District of Mississippi (R. 57).[1]

Opinions Below

The opinion of the district court (R. 55-56) is unreported. The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals (R. 66, App., infra, p. A-6) was entered on December 22, 1969, and this petition was filed within ninety days of that date.

Jurisdiction is conferred upon this Court by 28 U. S. C., § 1254(1).

Question Presented for Review

Does a United States district court have jurisdiction, under 28 U. S. C., § 1343, of a civil claim filed by certain employees and a union against an employer and its supervisory personnel alleging unlawful interference with an attempted union organizational campaign and deprivation of the rights of collective bargaining, or is such jurisdiction pre-empted by the National Labor Relations Act?[2]

Statutes Involved

Title 28 U. S. C., §1343 and the pertinent sections of the National Labor Relations Act, 29 U. S. C., §§ 152(9),

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[1] References are to pages of Record certified to this Court by the Clerk of the United States Court of Appeals for the Fifth Circuit.

[2] If certiorari should be granted, petitioners reserve the right to brief and argue the question as to whether respondents' Complaint states a claim upon which relief can be granted under 42 U. S. C., §§ 1983, 1985 or 1986.

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157, 158(a)(1), and of the "Civil Rights" Acts, 42 U. S. C., §§ 1983, 1985(3) and 1986, are set out in the Appendix hereto, infra, at pp. A-8 through A-11.

Statement of the Case

This suit was filed by respondents, employees of petitioner Emerson Electric Co. (hereinafter "Emerson"), and by a union, the International Union of Electrical Workers (hereinafter "IUE"), against petitioners and others, alleging that petitioners had violated respondents' "civil rights" as a result of an alleged conspiracy to deprive respondents of their right to organize and unionize Emerson's plant in Philadelphia, Mississippi. The jurisdiction of the district court was invoked under 28 U. S. C., § 1343.

The petitioners herein are (1) Emerson, a Missouri corporation, the employer; (2) U. S. Electrical Motors, Inc., now a division of Emerson; (3) Ben Hardwick, superintendent of Emerson's Philadelphia plant; (4) Travis Cheatham, Emerson's general foreman; and (5) Jerry Palmer, personnel manager of the plant. There are numerous other defendants, including county and municipal officials, who are not parties to this petition.

Inasmuch as the district court granted petitioners' motion to dismiss, the facts before this Court are the well-pleaded averments of the Complaint (R. 1-14). For the purposes of this petition, the critical allegations are that since 1963 Emerson has operated a plant in Philadelphia, Mississippi, which was financed by an industrial revenue bond issue approved by the Agricultural and Industrial Board of the State of Mississippi and the voters of Neshoba County (R. 3-4). The IUE has been engaged in an effort to organize and unionize the employees of Emerson's Philadelphia plant and to establish the IUE as the

bargaining agent for such employees (R. 5). The union assigned one Fred Prater to meet with Emerson's employees to encourage them to further the cause of the union and to distribute union literature (R. 5).

Respondents allege that petitioners have joined among themselves and with others, under color of state law, to deprive respondents of their rights, privileges and immunities secured by the First and Fourteenth Amendments, their freedom of speech, press, choice, vote and assembly, and their right to receive and disseminate information concerning federal legislation, to wit: the National Labor Relations Act (R. 6). Respondents further allege that on February 1, 1967, petitioner Cheatham, Emerson's foreman, instructed certain employees of Emerson to "start trouble with plaintiff Prater and those assisting him, in order to prevent the distribution of handbills favorable to IUE" at the exit gate of Emerson's plant (R. 6).

It is further alleged that on March 1, 1967, on the orders of petitioners Palmer and Cheatham, certain of Emerson's employees were required to sign a pledge to resist the union (R. 7). Thereafter, shortly before midnight of March 1, certain of Emerson's employees are charged with having physically attacked the union organizers and sympathizers near the gate of the Philadelphia plant to prevent them from distributing IUE handbills (R. 7).

Respondents seek damages under 42 U. S. C., §§ 1983, 1985(3) and 1986 for their personal injuries and request an injunction to prevent petitioners from depriving respondents of the benefits of unionization and collective bargaining at Emerson's Philadelphia plant.

The district court dismissed the Complaint on two grounds: (1) that the Complaint failed to state a claim upon which relief can be granted because the actions

complained of were not taken "under color of state law"; and (2) that the alleged claims are arguably within the exclusive jurisdiction of the National Labor Relations Board (R. 57). The Court of Appeals for the Fifth Circuit reversed on both grounds, holding that the Complaint contained a sufficient allegation of action "under color of state law" and that respondents' claims were not pre-empted by the National Labor Relations Act (See pp. A-1 through A-5, infra).

Reasons for Granting the Writ

1. The Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

2. This case presents an important question in the administration of the National Labor Relations Act. The decision of the Court of Appeals, if allowed to stand, would sanction wholesale circumvention of the National Labor Relations Board, which Congress has expressly endowed with exclusive jurisdiction of labor disputes to prevent fragmentation and inconsistency in the administration of the national labor policy.

ARGUMENT

I. The Court of Appeals Has Decided a Federal Question in a Way Which Is in Conflict With the Decision of This Court in San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959).

This case, as between these petitioners and respondents, is a "labor dispute," as that term is defined in 29 U. S. C., § 152(9). The plaintiffs in the district court were the IUE, one of its organizers, and Emerson employees who were evidently sympathetic to the union.[3] The petitioners here are the employer, Emerson, one of its divisions, its plant superintendent, general foreman, and plant personnel manager.

The Complaint specifically alleges that Emerson is an "employer" whose business affects commerce within the meaning of the National Labor Relations Act (R. 4-5) and that the IUE is a "labor organization" as contemplated by the Act (R. 1-2). The activities of the respondents which they are seeking to insulate from petitioners' interference are detailed in paragraph 6 of Count I of the Complaint (R. 5):

> "6. IUE is presently, and at all times material hereto, engaged in an organizational effort among the appropriate employees of the Company, so that said employees may have an opportunity freely, without coercion and duress, to select a collective bargaining representative and engage in collective bargaining and other activities for their mutual aid and protection as is their right under the LMRA."

It is further alleged in paragraph 7 that plaintiff Prater, an international representative of IUE, had been assigned

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[3] The union and its organizer, Prater, withdrew from the case prior to its submission to the Court of Appeals (R. 63). This, of course, does not change the nature of the dispute.

to distribute informational material relative to union organizing and that his mission was to encourage the employees of Emerson to designate IUE as their collective bargaining representative.

Paragraph 8 of the Complaint asserts that, as an integral part of the organizational campaign by the IUE, plaintiff Prater participated with other employees in the distribution of union handbills to Emerson employees on a public thoroughfare at the exit of the company's premises in Philadelphia, Mississippi.

The respondents are charged with engaging in conduct aimed at preventing the distribution of handbills favorable to the IUE, and it is alleged that as a result, respondents "are being deprived of the benefits of unionization and collective bargaining" at the Emerson plant (R. 8).

Section 7 of the National Labor Relations Act (29 U. S. C., § 157) provides in part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

Section 8(a)(1) (29 U. S. C., § 158(a)(1)) makes it an unfair labor practice for the employer to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

Therefore, there can be no doubt that the endeavors of respondents constitute protected activities under Section 7 of the NLRA and that the acts attributed to petitioners, if true, would constitute an unfair labor practice under § 8(a)(1).

As between the parties to this petition, then, this is a classic employer-employee dispute, the resolution of which Congress has entrusted solely to the competence of the National Labor Relations Board. Respondents have acknowledged the Board's jurisdiction over this dispute by filing an unfair labor practice charge with the Board (R. 48-53). The New Orleans office of the NLRB refused to issue a complaint against the employer, and this refusal was upheld on appeal by the office of general counsel of the Board (See Appendix, infra, p. A-12). Respondents are now asking the federal courts to re-examine the exact same factual situation and to reach a conclusion in conflict with that of the Board. This is precisely the type of abuse which Congress and the preemption doctrine have sought to prevent.

In 1959, this Court in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, stated:

> "... When an activity is arguably subject to Section 7 or Section 8 of the Act, the States *as well as the Federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (Emphasis supplied.)

The Court in the *Garmon* case was confronted with a question of state court jurisdiction in a labor dispute, and it held that the state court there was without jurisdiction to adjudicate the issues involved in that controversy. In so doing, the Court ruled unequivocally, as stated in the above quotation, that federal courts must also defer to the exclusive expertise of the Labor Board. See *Amazon Cotton Mills Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948); *Portland Web Pressmen's Union v. Oregonian Publishing Company*, 286 F. 2d 4 (9th Cir. 1960), *cert. denied* 366 U. S. 912 (1961). In the

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Amazon case, the Fourth Circuit made the following oft-quoted observations, l. c. 186:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise in the unfair labor practices which it defined." (Citations omitted.)

The reasoning of this Court in arriving at its decision in the *Garmon* case is directly applicable here. The Court emphasized that when it is clear from the pleadings or "may be fairly assumed" that the cause of action pleaded purports to seek remedial regulation over matters protected by Section 7 of the Act, or an unfair labor practice under Section 8, it was the compelling Congressional direction in the enactment of the National Labor Relations Act to repose the responsibility for the administration of such labor matters and the determination of appropriate remedial action to the exclusive and primary competence of the Labor Board. This is true "regardless of the mode adopted" because, as the Court said, "to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes" (359 U. S. at 244).

The rationale of pre-emption is premised on the expertise of the Labor Board and the desirability of avoiding incompatible or conflicting adjudications. In *Garner v. Teamsters Union*, 346 U. S. 485, 490-91 (1953), this

Court acknowledged the necessity of centralized administration of federal labor law:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Therefore, this Court has uniformly and consistently held that neither state nor federal courts have jurisdiction over suits directly involving activity which is even *arguably* subject to Section 7 or 8 of the NLRA. There can be no doubt that the allegations of the Complaint in the case at bar charge activities *squarely* within such sections.

The union, Mr. Prater and a Mr. McNeil were, according to the Complaint, attempting to organize the employees at Emerson's plant, and the activities alleged to have been committed by the petitioners were charged as having been designed to restrain and coerce Emerson's employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 51). Respondents seek to escape the effect of *Garmon* by giving the acts complained of different names and by joining persons other than these petitioners as parties defendant. Instead of charging, as they did in their unfair labor practice complaint, that the petitioners "restrained and coerced [the] employees in the exercise of

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their rights guaranteed in Section 7 of the Act" (R. 51), respondents allege that the petitioners deprived them of their "civil rights." But the pre-emption doctrine, as enunciated by this Court in the *Garmon* case and in the series of subsequent cases dealing with similar questions, does not recognize any such exception as that which the Court of Appeals has here sanctioned.

Congress has carved out only two legislative exceptions to exclusive NLRB jurisdiction in Sections 301 and 303 of the Act (29 U. S. C., §§ 185, 187), which provide for private suits to remedy breaches of labor contracts, secondary boycotts and jurisdictional disputes. See, e. g., *Smith v. Evening News Association,* 371 U. S. 195 (1962). This Court has also recognized certain limited departures from pre-emption where the interest of the NLRB in a given dispute is merely peripheral and the *local* or *state* concern is direct, paramount and overriding, as in cases of violence, *Automobile Workers v. Russell,* 356 U. S. 634 (1958), and libel, *Linn v. Plant Guard Workers,* 383 U. S. 53 (1966). These cases merely recognize the *state's* interest in maintaining peace and order. The other exception countenanced by this Court allows civil litigation where the union has breached its duty of fairly and equally representing all union members. *Vaca v. Sipes,* 386 U. S. 171 (1967). None of the recognized exceptions to the *Garmon* doctrine is even remotely applicable here.

Each of the cases recognizing such exceptions nonetheless expressly reaffirms the *Garmon* pre-emption doctrine and clearly mandates that avoidance of the NLRB as a forum must be discouraged and sharply circumscribed. Typical of these reconfirmations of *Garmon* is the statement of the Court in *Linn v. Plant Guard Workers,* 383 U. S. at 59:

> "However, in framing the pre-emption question before us we need look primarily to *San Diego Building*

Trades Council v. Garmon, 359 U. S. 236 (1959). There in most meticulous language this Court spelled out the 'extent to which the variegated laws of the several States are displaced by a single, uniform, national rule . . .' At 241. The Court emphasized that it was for the Board and the Congress to define the 'precise and closely limited demarcations that can be adequately fashioned by legislation and administration,' while '[o]ur task is confined to dealing with classes of situations.' At 242. In this respect, the Court concluded that *the States need not yield jurisdiction 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'*" (Emphasis supplied.)

It should be very carefully noted that the interest of the Labor Board in the present case is not peripheral but direct, and that there is no "local" interest involved here. Rather, respondents are seeking to assert a parallel *federal* right by the mere expedient of characterizing the acts complained of as a "violation of civil rights" rather than an "unfair labor practice."

The Court of Appeals below attempted to justify its departure from *Garmon* by branding this case with a *Linn* or *Vaca* label. This reasoning is unpersuasive. There is simply no basis for comparison between *Linn* and *Vaca* on the one hand and this case on the other. There is no precedent, implied or express, for circumventing the NLRB merely by attaching a "civil rights" tag to a labor dispute. Nor can jurisdiction of an unfair labor practice charge be conferred on a federal district court *as against*

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a defendant employer by the simple device of joining that employer with other co-defendants over whom the NLRB has no jurisdiction.

II. This Case Presents an Important Question in the Administration of the National Labor Relations Act.

In addition to the remedy properly available to respondents against petitioners under the exclusive jurisdiction of the Labor Board, they seek to create an additional remedy against these petitioners enforceable in the federal courts, parallel to and contemporaneous with that given to them by the NLRA. This they attempt to do under the more popular banner of "civil rights" rather than the more prosaic one of "unfair labor practice"; and, as indicated, they seek this novel remedy not in lieu of but in addition to the remedies provided by the Act.

Although the actions complained of, if proven, would undoubtedly constitute an unfair labor practice in violation of Section 8 of the Act, and the union and the employees involved would be entitled to the remedies provided for them by the Act,[4] and although respondents have actually asserted their rights under the Act, they seek—merely by using different terminology—simultaneously to devise and assert a separate, concurrent and supplemental remedy, for the same alleged offense, which will be enforceable in the federal courts.

The Court of Appeals acknowledged (p. A-5, infra) that "this case is one presenting delicate and far-reaching questions." Indeed, the judgment of that Court, if allowed to stand, would authorize and encourage unions and employees to file complaints with the Labor Board against

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[4] The Court of Appeals recognized that the NLRB could afford adequate relief against these petitioners. See Appendix, infra, p. A-5.

any alleged unfair practices on the part of employers and at the same time to sue in the federal courts for damages and injunctions. And if the Labor Board should hold, as it has done here, that the evidence does not support the allegation of an unfair labor practice, the employees could then seek recourse in the courts and request a determination that the acts which did not constitute unfair labor practices somehow or other violated their "civil rights." Even in those cases where the Labor Board might find that unfair labor practices have been committed and grant the relief prayed for, the complainants might also seek to obtain separate, supplemental and additional relief in the courts.

It is difficult to conceive of a device more likely to produce direct conflict and inconsistencies between the decisions of the federal courts and the national labor policy as determined and enunciated by the National Labor Relations Board, the very result which Congress has disapproved and which the pre-emption doctrine is designed to avoid. We emphasize once again this Court's observations in *Garner v. Teamster's Union,* 346 U. S. 485, 490-91:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

It should be noted that the reconsignment of this case to the NLRB as against these petitioners would not cause the respondents to be deprived of any legal remedies to which they might be entitled. The question of union representation would be adjudicated by the legislatively designated tribunal—the Labor Board; and any damages suffered by any of the respondents can be redressed in a conventional tort action, which could, under appropriate circumstances, eventuate in an injunction.

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We deem it unnecessary at this stage to discuss the question as to whether this suit may properly proceed as a "civil rights" action against the defendant county and municipal officials, emphasizing only that the inclusion of the employer and its supervisory personnel as co-defendants is proscribed by the national labor policy and the *Garmon* doctrine. Regardless of how the claim against other defendants is denominated, the claim against *these petitioners* is that of an unfair labor practice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX

APPENDIX A

Opinion

In the
United States Court of Appeals
For the Fifth Circuit

No. 27122

J. R. Fulton, et al.,
Plaintiffs-Appellants,

versus

Emerson Electric Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(December 22, 1969)

Before Brown, Chief Judge, and Jones and Carswell, Circuit Judges

Per Curiam: Here employees of Emerson Electric's Philadelphia, Mississippi plant seek reversal of the District Court's judgment dismissing their claims under the Civil Rights Acts—42 U. S. C. A., §§ 1983, 1985 and 1986. In the District Court plaintiffs sought relief against Emerson Electric, various public officials of the City of Philadelphia

and Neshoba County, Mississippi, and a group of private citizens of Neshoba County, including employees of Emerson Electric and the editor of the *Neshoba Democrat*, a local newspaper. The relief sought was for alleged interference with plaintiffs' rights of freedom of speech and assembly and statutory Section 7 rights to organize labor unions. 29 U. S. C. A., § 157.

As is too often the case when claims are dismissed on the pleadings,[1] the District Court's dismissal was premature. The District Court held that the pleadings did not state a claim because they did not allege the "state action" necessary under the Civil Rights Acts. Much of this seems traceable to the impression gained by the trial court from arguments successfully pressed on it by the defendants, and renewed with like vigor here, that this is a case seeking damages and other relief for a physical assault physically committed against plaintiffs by fellow employees of Emerson in which none of the enumerated defendants had any immediate participation. In addition, the District Court held that relief could not be granted because the claims were "within the exclusive jurisdiction of the National Labor Relations Board."

When the pleadings are given a *Conley*[2] reading it is, however, apparent that sufficient "state action" has been alleged. The gravamen of the complaint was that one or more or all of the public officials, private citizens, and the company took concerted action to deprive plaintiffs of an opportunity to attempt to organize a union in the com-

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[1] See Pred v. Board of Public Inst., 5 Cir., 1969, ... F. 2d ..., ..., n. 1 [No. 26576, Sept. 9, 1969].

[2] Conley v. Gibson, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. See also Pred v. Board of Public Inst., 5 Cir., 1969, ... F. 2d ..., ..., n. 11 [No. 26576, Sept. 9, 1969 Slip op. p. 18]; Gomez v. Florida State Employment Service, 5 Cir., 1969; ... F. 2d ..., ... [No. 26719, Oct. 9, 1969 Slip op. pp. 19-20].

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pany's plant.[3] It was, of course, specifically alleged that (i) the union spokesmen were beaten when they attempted to distribute literature, and that (ii) the beating was a product of the alleged concerted action, and that (iii) the public officials acquiesced[4] in these assaults.[5] But it was

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[3] The directness with which these fundamental, constitutionnal claims were asserted is illustrated by paragraphs 9 and 10 of the complaint:

> "9. To frustrate the efforts of Plaintiffs the Defendants have joined together among themselves with officers and agents of the Company, and with persons whose identities are not now known to the Plaintiffs, intentionally to discriminate against the Plaintiffs and to deprive them, and to cause them to be deprived—under color of statutes, ordinances, laws, customs and usages of the town of Philadelphia, County of Neshoba and State of Mississippi—of their rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States—including but not limited to, their right to freedom of speech, press, choice, vote and assembly secured by said Amendments, and to the equal protection of the laws within the State of Mississippi, and their privileges and immunities under said Amendments, as United States citizens, to disseminate and receive information concerning federal legislation and to assemble peaceably for the discussion of federal legislation.
>
> "10. Acting jointly, as aforesaid, the Defendants and others whose identities are not now known to Plaintiffs—acting under color of Mississippi law and authority—have taken action, or caused or instigated action to be taken—likewise under color of Mississippi law and authority—depriving Plaintiffs of their constitutional rights referred to in subparagraph 9 above."

[4] At least at this stage it cannot be ruled out that the proof might permit acquiescence in such assaults to supply the requisite state action. See Burton v. Wilmington Parking Authority, 1961, 365 U. S. 715, 725, 81 S. Ct. 856, ..., 6 L. Ed. 2d 45, 52, where the Court says:

> "But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be * * *. By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

[5] In addition to the concerted action alleged by plaintiffs, they also attempt to demonstrate state action by allegations that the

much more than a case in which plaintiffs were seeking to impose liabilities on all or some of the defendants for an assault which, on a total reading of the complaint, is but a manifestation of the concerted action asserted.

Concerted action of private parties and state officials has consistently been held to be sufficient allegation of "state action" for 42 U. S. C. A., § 1983 and § 1985, *U. S. v. Price*, 1966, 383 U. S. 787, 793, 86 S. Ct. 1152, ..., 16 L. Ed. 2d 267, 272; *Gomez v. Florida State Employment Service*, 5 Cir., 1969, ... F. 2d ...., ... [No. 26719, Oct. 9, 1969, slip op. pp. 19-20]; *Baldwin v. Morgan*, 5 Cir., 1961, 287 F. 2d 750; *Boman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F. 2d 531.

The District Court was also mistaken in applying the doctrine of the pre-emption of labor matters by the NLRB. It is true that "as a general rule, neither state nor federal Courts have jurisdiction over suits directly involving 'activity [which] is arguably subject to § 7 of § 8 of the Act.'" *San Diego Building Trades Council v. Garmon*, 1959, 359 U. S. 236, 245, 79 S. Ct. 773, ..., 3 L. Ed. 2d 775, 783. But like all "general rules" the doctrine of the NLRB's pre-emption is subject to exceptions. See e. g., *Linn v. Plant Guard Workers*, 1966, 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582; *Vaca v. Sipes*, 1967, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842. Thus the pre-emption of federal and state Court jurisdiction over a particular class of cases depends "upon the nature of the particular interest being asserted and the effect upon the administra-

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Emerson Electric Philadelphia plant was financed under the Mississippi industrial revenue bond program administered by that State's "A & I Board". It is, however, unnecessary for us to here pass on whether such state financial participation is sufficient "state action" under the Civil Rights Acts to state a claim for which relief can be granted when other actions not directly connected with the financing are alleged. But see Burton v. Wilmington Parking Authority, 1961, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

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tion of national labor policies of concurrent judicial and administrative remedies." *Vaca v. Sipes, supra,* 386 U. S. at 180, 87 S. Ct., at ...., 17 L. Ed. 2d at 852.

The particular interests involved here may include those employee-employer relationships that the NLRB was established to deal with. But many more interests are also involved. The dispute is not just between an employee and his employer; it is also between citizens and those who control the political institutions of a whole community.[6] The relationship is not just employee-employer, but individual and the state through participation of state officers in actions by private persons. The NLRB was not intended to deal with such problems. Indeed, it could afford no relief as against any party but the employer. The problems alleged here are of constitutional proportions —an area where Courts always have a role. *Vaca v. Sipes, supra.* See also, *Automobile Workers v. Russell,* 1957, 356 U. S. 634, 78 S. Ct. 923, 2 L. Ed. 2d 1030.

Bearing upon both dismissal on the pleadings and preemption it deserves emphasis that this case is one presenting delicate and far reaching questions. Questions that demand full-bodied records for disposition. *Public Affairs Associates v. Rickover,* 1962, 369 U. S. 111, 82 S. Ct. 5. Thus, at least on the record that now comes to us, we cannot say that plaintiffs could not prove facts that would entitle them to relief. We therefore return this case to the District Court, but we do so without even a whisper as to what the ultimate result should be.

Reversed and Remanded.

---

[6] This community has been the locale for other civil rights controversies. See U. S. v. Price, 1966, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267; Posey v. United States, 5 Cir., 1969, ... F. 2d ... [No. 25654, July 17, 1969].

APPENDIX B

Judgment

United States Court of Appeals
For the Fifth Circuit

October Term, 1969

No. 27122

D. C. Docket No. CA 1419

J. R. Fulton, et al.,
Plaintiffs-Appellants,

versus

Emerson Electric Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before Brown, Chief Judge, Jones and Carswell, Circuit Judges

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by Counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 22, 1969

APPENDIX C

Statutes

28 U. S. C., § 1343 "Civil Rights and Elective Franchise":

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

29 U. S. C., § 152 "Definitions":

* * * * * * * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation

of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

29 U. S. C., § 157 "Right of Employees as to Organization, Collective Bargaining, etc.":

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

29 U. S. C., § 158 "Unfair Labor Practices":

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ."

42 U. S. C., § 1983 "Civil Action for Deprivation of Rights":

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C., § 1985 "Conspiracy to Interfere With Civil Rights—Preventing Officer From Performing Duties":

* * * * * * * *

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

42 U. S. C., § 1986 "Same; Action for Neglect to Prevent":

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of

the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. . . ."

APPENDIX D

National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

March 6, 1969

Re: U. S. Electric Motors, Inc.
Div. of Emerson Electric Co., et al.

Case No. 15-CA-3153

Mr. Melvin Warshaw
Assistant General Counsel
International Union of Electrical, Radio
and Machine Workers, AFL-CIO
1126 Sixteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Warshaw:

Your appeal from the refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Under all the circumstances, it could not be established that the Company had initiated, supported, condoned or ratified the assault on Union organizers. The evidence disclosed that the Company had promptly and publicly deplored and disavowed the acts of violence and warned against recurrences of such conduct, and that, following the Company's action Union literature was distributed peacefully and without inci-

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dent. Accordingly, and absent any other issue on appeal, further proceedings herein were unwarranted.

Very truly yours

Arnold Ordman
General Counsel

By: Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 15

FILE COPY

Office Supreme Court, U.S.
FILED
APR 27 1970
JOHN F. DAVIS, CLERK

NO. 1297

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

EMERSON ELECTRIC CO., U. S. ELECTRICAL MOTORS, INC., BEN HARDWICK, TRAVIS CHEATHAM AND JERRY PALMER.....Petitioners

vs.

J. R. FULTON, HUBERT LOVERN, PAT GREEN, R. B. ROBERTSON, ALONZO DAVIS, LESTER LONG, ALTON COLE, OLYN COWARD AND CLIFTON McDONALD.....Respondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DIXON L. PYLES
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1297

EMERSON ELECTRIC CO., U. S. ELECTRICAL MOTORS, INC., BEN HARDWICK, TRAVIS CHEATHAM AND JERRY PALMER.....Petitioners

vs.

J. R. FULTON, HUBERT LOVERN, PAT GREEN, R. B. ROBERTSON, ALONZO DAVIS, LESTER LONG, ALTON COLE, OLYN COWARD AND CLIFTON McDONALD.....Respondents

---

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents, J. R. Fulton, Hubert Lovern, Pat Green, R. B. Robertson, Alonzo Davis, Lester Long, Alton Cole, Olyn Coward and Clifton McDonald respectfully oppose the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered on December 22, 1969.

Defendants: Carl J. Deweese, J. P. Stokes, Johnny L. McGraw, Irby Goldman and H. L. Breazeale, individually and as members of the Board of Supervisors

for Neshoba County, Mississippi; Lewis Clayton, Willis McKee, Paul Chunn, Johnny Whinery, and Harlan Majure, individually and as the mayor and aldermen of the town of Philadelphia, Mississippi; William D. Perry, individually and as Chief of Police in the town of Philadelphia; Stanley Dearman, editor of the Neshoba Democrat; Ray Stepp, James Smith, James Partridge, Dwight Gray, Ellis Fulton, Mike Barnett, Jerry Jenkins, Keith Copeland, Marzine Brantley, Jimmy Fox and Bernice Parker, did not petition this court for a Writ of Certiorari to review the judgment of the court below.

OPINION BELOW

The opinion of the Fifth Circuit is cited as 420 F 2d 527 (1969).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Fulton and McNeil, employees of Vickers, Inc., Jackson, Mississippi, were members of a local union at the Vickers Plant. Fred Prather was a representative of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE).[1] The other respondents were, at the time suit was filed, employees of Emerson. Prather sought the assistance of Fulton and McNeil in an attempt to organize the employees of Emerson. As the three non-employees of Emerson attempted to distribute handbills on a state highway adjacent to the plant, they were attacked by a mob, prevented from exercising their rights under the First

[1] McNeil, Prather and IUE did not join the appeal from the district court's dismissal of the complaint, and they are not respondents here.

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Amendment and statutory §7 rights, 29 USC §157. IUE, Prather, McNeil, Fulton and the other respondents filed suit in the district court in the Southern District of Mississippi, pursuant to the Civil Rights Acts — 42 USC §§1983, 1985, and 1986 — seeking equitable relief and damages against Emerson, various public officials of the town of Philadelphia and Neshoba County, and certain private citizens. The complaint charged that the defendants conspired to and did interfere with plaintiffs' rights of freedom of speech and assembly and statutory rights pursuant to 29 USC §157 to organize labor unions. The district court dismissed the action on the pleadings on the grounds: (1) That the complaint did not state a claim on which relief could be granted in that the complaint failed to allege the "state action" necessary under the Civil Rights Acts; and (2) that the claims were within the exclusive jurisdiction of the National Labor Relations Board (NLRB). The court of appeals reversed. The questions presented are:[2]

1. Whether concerted action of private parties and state officials, alleged in the complaint, is sufficient allegation of "state action" to state a claim upon which relief can be granted pursuant to 42 USC §§1983, 1985 and 1986?

2. Whether, and to what extent, the comprehensive scheme of federal regulation embodied in the National

[2] Plaintiffs contend in the complaint, that "state action" was also alleged in that the Emerson plant was financed under the Mississippi "Balance Agriculture with Industry Program" by the use of public funds, and administered by the State's "A & I Board". In footnote 5, the Circuit Court of Appeals ruled it was necessary to pass on whether such state financial participation and ownership of the plant was sufficient "state action" under the Civil Rights Acts to state a claim for which relief could be granted when other actions not directly connected with the financing were alleged. However, the court invited attention to *Burton v. Wilmington Parking Authority*, 1961, 363 US 715, 81 S Ct 856, 6 L Ed 2d 45.

Labor Relations Act (NLRA) as amended, has superseded the remedies provided by the Civil Rights Acts?

3. Whether the only forum available to respondents is the NLRB?

STATEMENT

The facts in the record are set forth in the complaint, and they are uncontradicted (R. 1-15).[3] The complaint is in three counts. In Count I, plaintiffs-respondents asserted a claim for damages and equitable relief to redress the deprivation under color of state law, regulation, custom and usage, or rights secured to them under the Fourteenth Amendment and 42 USC §1983 (R. 3). In Count II, plaintiffs-respondents asserted a claim to recover damages for injuries and for deprivation of rights due them as citizens which resulted from enumerated acts done by the defendants[4] in furtherance of a conspiracy with an unlawful purpose and carried out by illegal means in violation of 42 USC §1985 (R. 8). Plaintiff-respondents, in Count III, assert a claim for damages pursuant to 42 USC §1986 for the alleged failure of the defendants to prevent or aid in preventing the injury to plaintiffs' rights (R. 11).

The complaint alleges that on December 26, 1961, the town of Philadelphia, Mississippi, entered into a contract with U. S. Electrical Motors, Inc., (Emerson has now acquired the latter and operates the plant as a division thereof). The municipality made application to the Mississippi Agricultural and Industrial Board (A & I Board), an agency of the state, for a certificate of public convenience and necessity, pursuant to Chap-

[3] In the petition it is erroneously stated (p. 3): "This suit was filed by respondents, employees of petitioner. . ., and by a union . . ." As has been pointed out hereinbefore, Fulton, McNeil and Prather were never employees of Emerson.

[4] Some but not all of whom are petitioners here.

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ter 2, Title 23, Mississippi 1942 Code §§8936, et seq. The A & I Board approved the venture and on January 18, 1962, issued Certificate of Convenience and Necessity No. 371. The town electorate, on February 27, 1962, approved the bond issue, and the bonds were forthwith issued and sold. Following the sale, the mayor and board of alderman purchased approximately 112 acres of land for the plant site and awarded a construction contract. The plant was completed in August, 1963, and the company began operations. The town and the company entered into a lease contract for a term of 20 years (R. 3, 4). Two additional bond elections have been held to expand the plant. One additional issue was for $900,000.00, and the other was for $500,000.00. A total of $2,200,000.00 in public funds has been expended to build, equip and expand the plant. The County of Neshoba, wherein Philadelphia is county seat, was the political subdivision issuing the bonds for the plant expansion. (R. 4).

On February 1, 1967, Fulton and McNeil, members of IUE Local 792, at the Vickers Plant, with Prather, IUE Representative, passed out handbills to the employees of Emerson. They stood on the edge of a state highway contiguous to the plant. Travis Cheatham, general foreman of Emerson, instructed certain employees to start trouble with the union organizers in order to prevent the distribution of the literature favorable to the labor organization, and to chill the exercise by respondents of their First Amendment rights. (R. 6).

In the afternoon of March 1, 1967, Prather, McNeil and Fulton passed out another handbill and decided to distribute handbills that night as the second shift came off work. At about 8:30 P.M. on March 1, 1967,

a plan was made in the plant, under the direction of certain supervisory personnel, to have a mob attack Prather, McNeil and Fulton to prevent the respondents from communicating with Emerson employees and exercising First Amendment rights. (R. 7). Shortly before 12:00 o'clock midnight, a group of employees, pursuant to the plans previously made, left the plant before the shift ended, marched in a body, and physically assaulted Prather, McNeil and Fulton as they stood with union handbills at the intersection of State Highway 15 North and the driveway leading to the plant of Emerson, inflicting great physical damage on these union organizers. The mob effectively prevented respondents from exercising their First Amendment rights of free speech and assembly.

Certain of the respondents, on March 3, 1967, went to the office of William D. Perry, Chief of Police of Philadelphia, and reported the details of the attack, and also told him that they desired to continue the efforts on the public thoroughfares of the town of Philadelphia to organize the employees of Emerson, and to communicate with the said employees. Perry refused to investigate or prosecute the wrongdoers and refused to furnish protection to the respondents in their efforts to distribute literature and disseminate information concerning the union and the benefits to be gained by becoming a member. (R. 7).

The gravamen of the complaint was that the public officials, private businessmen, certain supervisors, employees and the company, in order to frustrate the efforts of the plaintiffs to exercise their First Amendment and federal statutory rights to communicate, assemble and peaceably organize a union, took concerted action and entered into a conspiracy against the plain-

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tiffs. It was charged that the union organizers were beaten when they attempted to distribute literature favorable to the labor organization; that the violence was a part of the concerted action and the unlawful means of carrying out the illegal purposes of the conspiracy; and that the public officials acquiesced in the physical assaults and discriminatory actions against plaintiffs. (R. 6-8).[5]

All defendants on August 30 and 31, 1967, filed motions to dismiss on the grounds: (1) The complaint failed to state a claim upon which relief could be granted; and (2) the district court lacked jurisdiction of the subject matter because the claims were within the sole and exclusive jurisdiction of the NLRB. (R. 16-47). The district court rendered an opinion on October 8, 1968, sustaining both grounds (R. 55-56); and, on October 11, entered an order dismissing the complaint (R. 57-58). On appeal the Circuit Court of Appeals reversed the district court and remanded the cause for a trial on the merits.[6]

REASONS FOR REFUSING THE WRIT

Respondents contend that this court should refuse to grant the writ of certiorari for the reasons set forth in the following paragraphs.

1. The decision of the Court of Appeals for the Fifth Circuit in this case in no way conflicts with the holdings of this court or with any other circuits. It is in full accord with all of the decisions in which the issues present herein have been considered. The Court of Appeals followed the pronouncements of the con-

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[5] 420 F. 2d, at pages 529, 530, fns. 3, 4.
[6] 420 F. 2d, at page 530.

trolling principles enunciated in *U.S. v. Price,*[7] *Linn v. Plant Guard Workers,*[8] and *Vaca v. Sipes.*[9]

2. Many more interests are involved in this case other than that of employee-employer relationships with which the NLRB was established to deal, since the dispute is between citizens and those who control the political institutions of a whole community. This case presents issues not limited to employee-employer relationships, but also issues of individual citizens and the state through participation of state officers in actions by private persons named as parties in the suit. The problems alleged in this complaint are of constitutional proportions, and they present matters with which the courts alone are equipped to cope. This case presents delicate and far reaching questions which demand full-bodied records for disposition.[10]

3. To reinstate the judgment of the district court and dismiss the complaint of the respondents as sought by petitioners would amount to a repeal of the Civil Rights Acts (42 USC §§1983, 1985 and 1986) by the NLRA (29 USC §151 et seq.), and would result in the denial of due process of law to respondents.

The Circuit Court of Appeals asserted that it was apparent that sufficient "state action" was alleged because the gravamen of the complaint was that public officials, private citizens and the company took concerted action to deprive the plaintiffs of even the opportunity to attempt to organize the employees of Emerson.

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[7] (1966), 383 US 787, 793.

[8] (1966), 383 US 53, 86 S.Ct. 657, 15 L.Ed. 2d 582.

[9] (1967), 386 US 171, 87 S.Ct. 903, 17 L.Ed. 2d 842.

[10] 420 F 2d at page 530, the Circuit Court of Appeals cites *Vaca v. Sipes,* supra; *International Union, United Automobile Workers (UAW-CIO) v. Russell,* 1957, 356 US 634, 78 S.Ct. 932, 2 L.Ed. 2d 1038; *Public Affairs Associates v. Rickover,* 1962, 369 US 111, 82 S.Ct. 580, 7 L.Ed. 2d 604.

ARGUMENT

POINT I.

ALLEGATION OF CONCERTED ACTION OF PRIVATE PARTIES AND STATE OFFICIALS IS SUFFICIENT "STATE ACTION" IN CIVIL RIGHTS SUITS

The district court held that the joinder of county and city officials with private party defendants in the complaint was insufficient to state a claim for relief under 42 USC §§1983, 1985 and 1986, and dismissed the civil action on the motion of defendants. The Circuit Court of Appeals reversed the district court and held:

> "[2] Concerted action of private parties and state officials has consistently been held to be sufficient allegation of 'state action' for 42 U.S.C.A. §1983 and §1985, *United States v. Price*, 1966, 383 U.S. 787, 793, 86 S.Ct. 1152, 1156, 16 L.Ed. 2d 267, 272; *Gomez v. Florida State Employment Service*, 5 Cir., 1969, 417 F. 2d 569, 578-579; *Baldwin v. Morgan*, 5 Cir., 1961, 287 F. 2d 750; *Boman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F. 2d 531." [11]

In *United States v. Price* [12] the rule is set forth in the following language:

> ". . .Private persons, jointly engaged with state officials in the prohibited actions, are acting 'under color' of law for the purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

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[11] 420 F. 2d, at page 530.

[12] 383 US, at page 794, 16 L.Ed. 2d, at page 272, 86 S.Ct., at page ———.

The statute referred to is 18 USC §242, but in footnote 7 [13] it is explained:

> "[5] 7. 'Under color' of law means the same thing of §242 that it does in the civil counterpart to §242, 42 USC §1983 (1964)..."

"Under color" of law in §1983 cases and "state action" under the Fourteenth Amendment amount to the same thing. [14] The complaint charged that the State of Mississippi, Neshoba County and the town of Philadelphia were joint venturers with Emerson in the operation of the manufacturing plant. The furnishing of public funds, acquiring land, constructing the plant and expanding the same was "state action" or "under color" of law since the political subdivisions had insinuated themselves into a position of interdependence with private persons. Since the conduct of the joint venturers violated the Fourteenth Amendment in regard to the plaintiffs, this also stated cause of action under §§1983, 1985(3) and 1986. [15] As was pointed out hereinbefore, the Circuit Court of Appeals deemed it unnecessary to pass on this charge.

Plaintiff-respondents correctly asserted jurisdiction under 28 USC §1343 in the complaint, and the Circuit Court of Appeals properly held that the pleadings, when given a *"Conley"* [16] reading, stated a claim upon which relief could be granted and jurisdiction under the Civil Rights Acts. Petitioners do not directly challenge this holding in their petition for a writ of certiorari.

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[13] *Ibid.*

[14] *Id.*, fn. 7.

[15] *Burton v. Wilmington Parking Authority*, 365 US 715, 6 L.Ed. 2d 45, 81 S.Ct. 856.

[16] *Conley v. Gibson*, (1957) 355 US 41, 78 S.Ct. 99, 2 L.Ed. 2d 80.

POINT II.

THE HOLDING OF THE CIRCUIT COURT OF APPEALS CONFLICTS IN NO WAY WITH THE DECISIONS OF THIS COURT PERTAINING TO PRE-EMPTION OF LABOR MATTERS

Petitioners erroneously assert that the controversy is solely between employees on one hand and Emerson and its top supervisory personnel on the other; that the case is a "labor dispute" as defined by 29 USC §159(2); that pursuant to §§7 and 8 of the NLRA [17] the exclusive jurisdiction to remedy respondents' complaints is vested in the NLRB; and that the decision of the Circuit Court of Appeals is in conflict with *San Diego Building Trades v. Gorman.* [18] The district court ruled that the claims in the complaint were pre-empted and in the exclusive jurisdiction of the NLRB and summarily dismissed the suit. (R. 56, 57). The Circuit Court of Appeals held that the district court was mistaken in applying the doctrine of pre-emption because there were many more interests than that of employee-employer relationships involved; that the dispute was also between citizens and those who control the political institutions of a whole community; that the suit was between individuals and the State through participation of State officers in actions by private persons; that the NLRB was not intended to deal with such problems and it could afford no relief as against any party but Emerson; that the problems alleged are of constitutional proportions where the courts have a constitutional role; and that the case presented delicate and far-reaching questions which demand full-bodied records for disposition. [19]

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[17] 29 USC §§157 and 158.

[18] (1959) 359 US 236, 245, 79 S.Ct. 773, 780, 3 L.Ed. 2d 775, 783.

[19] 420 F.2d, at page 530.

Petitioners mistakenly assert: "Respondents have acknowledged the Board's jurisdiction over this dispute by filing an unfair labor practice charge with the Board (R. 48-53)." The affidavit of Gaylord C. Burke (R. 49) states that the charge was "filed by one of the plaintiffs herein, namely, International Union of Electrical, Radio and Machine Workers, AFL-CIO. . .", and the charge (R. 50) shows that IUE is the charging party. IUE is not a respondent in these proceedings. Neither respondents nor counsel ever had any part in the proceedings before the Fifteenth Region of the NLRB. There has never been a hearing before the Board since the General Counsel refused to issue a complaint. There has been no adjudication by the Board of the facts alleged in the plaintiffs' complaint, nor could there be.

The integrity, efficacy, and uniformity of the national policy which the Congress has enacted to govern labor policy must be maintained; and the traditional responsibility of the federal government to insure its citizens their civil rights and to protect them in the exercise of constitutional rights is of paramount importance. By implication petitioners contend that both interests cannot be served, and that this court should ignore and sacrifice constitutional and civil rights of the respondents. The decision of the Court of Appeals, herein, preserves both interests without damage to either.

As reason number one for granting the writ of certiorari, petitioners dogmatically assert that the Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *San Diego Building Trades Council v. Garmon.*

The Court of Appeals gave due consideration to the *Garmon* case as stating the general rule of pre-emption

of labor matters by the NLRB and held that the district court was mistaken in applying the doctrine of pre-emption to this case. The Court of Appeals stated succinctly and with clarity the issues which distinguish this case from Garmon, as follows:[20]

> "The particular interests involved here may include those employee-employer relationships that the NLRB was established to deal with. But many more interests are involved. The dispute is not just between an employee and his employer. It is also between citizens and those who control the political institutions of a whole community. The relationship is not just employee-employer, but individual and the state through participation of state officers in actions by private persons. The NLRB was not intended to deal with such problems. Indeed it could afford no relief as against any party but the employer. The problems alleged here are of constitutional proportions — an area where the Courts always have a role."

The *Garmon* case was before this Court two times. On the first appeal[21] this Court held that the State Court had no power to enjoin the unions from peacefully picketing. The judgment appealed from was vacated and the cause remanded. The question reserved for consideration on remand was whether the NLRA precluded California from granting an award for damages arising out of the conduct in question. On remand the California court set aside the injunction but sustained the award of damages under state law. This Court again granted certiorari to determine whether the California court had jurisdiction to award damages

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[20] 420 F.2d, at page 530.

[21] (1957) 353 US 26, 1 L.Ed. 2d 618, 77 S.Ct. 607, 609, reh den 353 US 951, 1 L.Ed. 2d 860, 77 S.Ct. 858.

arising out of peaceful union activity which it could not enjoin, found that there was no compelling state interest involved, and reversed the judgment. The Court said:[22]

"* * * We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal and the other state, of inconsistent standards of substantive law and different remedial schemes.* * *

"* * * Thus judicial concern has necessarily focussed on the nature of the activities which the state has sought to regulate rather than the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has not required us to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act."

The *Garmon* case indicates that the activity which would be merely a peripheral concern of LMRA is "conduct marked by violence and imminent threats to public order."[23] This area is described in *Garner v. Teamsters C. & H. Union*[24] in the following language:

"This is not an instance of injurious conduct which the National Labor Relations Board is without ex-

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[22] 359 US, at pages 242, 243, 3 L.Ed. 2d, at pages 781, 782.
[23] 359 US, at page 247, 3 L.Ed. 2d, at page 784.
[24] (1953) 356 US 485, 488, 98 L.Ed. 228, 238, 74 S.Ct. 161.

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press power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers."

While the *Garmon* case and the *Garner* case are limited to concern with state powers, the same principle is applicable to the judicial exercise of federal powers, and this principle was correctly applied by the Court of Appeals to the issues in this case.

The *Garmon* case is so limited in its scope, as shown by the later decisions of the Supreme Court, that it does not conflict with the decision of the Court of Appeals in this case. The more recent cases of *Vaca v. Sipes*[25] and *Hanna Mining v. Marine Engineers,*[26] define the present state of the law and make it clear that the Court has in no way limited anything that the NLRB has the power to do, or may in fact do, with respect to any of the relief requested in the complaint. The private federal remedy available to respondents under 28 USC §1343 is unaffected by the possible or actual availability of an additional federal public remedy under the NLRA.

The case does not concern the pre-emption doctrine in its national supremacy aspects as was the situation in *Garmon* which involved a conflict between state and federal law. There it was held federal law excluded state law, but this case presents no issue of state law versus federal law. The district court, in effect, held, and petitioners contend, that the remedy under NLRA excludes the remedy under the Civil Rights Acts. From the decision in *Vaca v. Sipes,* cited supra, it can fairly be said that the presumption in respect to construing

[25] (1967) 386 US 171, 86 S.Ct. 903, 17 L.Ed. 2d 842.
[26] (1965) 382 US 181, 86 S.Ct. 327, 15 L.Ed. 254.

whether two federal remedies are to be deemed both fully available rather than one repealing the other, is just the opposite when the issue is whether federal law has displaced state law. Listed therein are many areas in which the Congress indicated it desired a multiplicity of remedies to be available and did not intend the one given in the NLRA to be exclusive. The right of an individual to sue in the courts to enforce an implied private federal law remedy for fair representation certainly should be applicable to the right of the respondents to sue in a federal court to enforce the express private federal right granted by Congress. In *Vaca v. Sipes* it was said:[27]

> "In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted 'where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act. . . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional directions, we could not infer that Congress has deprived the States of the power to act.' *San Diego Building Trades Council v. Garmon,* 359 U. S. at 236. See, e.g., *Linn v. Plant Guard Workers,* 383 U. S. 53 (libel); *Automobile Workers v. Russell,* 356 U. S. 634 (violence); *International Assn. of Machinists v. Gonzales,* 356 U. S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740 (mass picketing). See also *Hanna Mining Co. v. Marine Engineers Beneficial Assn.,* 382 U. S. 181. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and

[27] 386 US, at page 180.

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state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

In *Vaca v. Sipes,* the plaintiff's rights asserted in his suit were all derived from the NLRA, and jurisdiction in the courts rested on no express grant by Congress but solely on implication. In the instant case the complaint sought to protect rights granted to the respondents by the First and Fourteenth Amendments.

The Congress by 28 USC §1343 has expressly conferred jurisdiction on the district court to grant damages, injunction and other legal and equitable relief when such deprivation of constitutional or statutory rights is alleged and proved. This court in *Hague v. C. I. O.,*[28] held that "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment."

The instant case is a much clearer one for the exercise of judicial power than *Vaca v. Sipes* because of the protection of constitutional rights which is the object of this suit, whereas all the rights protected in *Vaca v. Sipes* arose solely by reason of the provisions of the NLRA. If the courts have jurisdiction even where all the rights protected found their genesis solely in the NLRA, *a fortiorari* they have jurisdiction where the rights asserted arise under the Constitution of the United States and other federal legislation.

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[28] (1938) 307 US 496, 511, 83 L.Ed. 1423, 1435, 59 S.Ct. 954.

The NLRB has no history of decisions which affords any basis for assuming that the Congress intended the Board's remedy to be one which excluded relief under the civil rights legislation specifically designed for just such deprivations of constitutional and statutory federal rights as occurred in this case.

The rights which respondents asserted in the instant suit are not grounded in labor relations. The basis of the complaint was the abuse of state power which resulted in the beatings suffered by the three individual plaintiffs when they attempted to exercise their First Amendment rights to communicate with employees and the deprivation of all plaintiffs of their constitutional and statutory rights. The discretionary remedies of the NLRB directed solely to the public impact in the field of labor relations of the conduct of the employer defendant are in no wise impinged upon but are rather strengthened and enhanced by concurrent proceedings, such as this one, in the federal courts to give damages and injunctive relief aimed at redressing a deprivation by abuse of state power of constitutional and federal rights.

In *Linn v. Plant Guard Workers,*[29] in holding that there was nothing inconsistent about allowing the courts to continue their traditional jurisdiction over libel suits, even though a concurrent jurisdiction in the NLRB was available, this Court stated:[30]

> ". . ., it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for con-

[29] 383 US 53 (1966).
[30] 383 US at pp. 66-67.

temporaneous violations of the Act. We disagree. When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. . . . Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent."

Similarly, in *International Assn. of Machinists v. Gonzales,*[31] the Supreme Court held that the courts and the NLRB could exercise concurrent jurisdiction over a wrongful expulsion from union membership. It was stated:[32]

". . . Although, if the union's conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. . . . And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United Automobile Workers v. Russell,* post, p. 634.

"If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coin-

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[31] 356 US 617 (1958).
[32] 356 US, at page 621.

cidence when the possibility of conflict with federal policy is similarly remote. . . ."

Again in *Automobile Workers v. Russell,*[33] this court held that a non-union employee could bring a common-law tort action in a state court to recover compensatory and punitive damages for losses he suffered by being barred from work by mass pickets. It was held:[34]

"In this case there is a possibility that both the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of 'conflict' of remedies referred to in *Laburnum.* Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, a conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts. . . .

". . . This does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress."

These cases establish that the test laid down in *Garmon* is not applicable here. Rather this is a case in which the district court could proceed concurrently with NLRB proceedings, and the remedies of both may properly supplement each other. In any event the decision of the Circuit Court of Appeals is not in conflict with *Garmon* as contended, but it is in full accord with the holdings of this Court in the decisions rendered since *Garmon* on the issue of pre-emption.

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[33] 356 US 634 (1958).
[34] Ibid., at pp. 644, 645.

In 1959, the Congress enacted 29 USC §523. This statute amended §8 and other clauses of NLRA. Of significance is the statement:

> ". . . except as explicitly provided to the contrary, nothing shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any state."

Respondents contend that this evinces a congressional policy with respect to §8 proscriptions to the effect that unless it is explicitly provided to the contrary in the NLRA, the rights and remedies provided in 42 USC §§1983, 1985, and 1986 are not taken away from respondents.

CONCLUSION

For the reasons set forth hereinbefore the petition for a writ of certiorari should be denied, and all costs should be assessed against petitioners.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1297

EMERSON ELECTRIC CO., et al.,
Petitioners,

v.

J. R. FULTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' Brief in Opposition to the Petition for a Writ of Certiorari is, in actuality, more in the nature of a brief on the merits, the thrust of which is to buttress our contention that this case requires the attention of this Court. Not only do Respondents not state any substantial reasons why this Court should not review this case, but on the contrary, throughout their brief, Respondents acknowledge that the issues in this case are of the highest degree of importance.

Respondents expressly concede that "this case presents delicate and far-reaching questions." (See Resp. Br. pp. 8, 11.) Respondents likewise admit that this case represents an attempt to create a new federal remedy for the enforcement of rights which are protected under §§ 7 and 8 of the National Labor Relations Act (29 U. S. C., §§ 157, 158). In sum, therefore, Respondents agree with the inescapable conclusion that this case presents vital questions in the administration of the national labor policy, which questions require resolution by this Court.

Lest our position be misconstrued (as Respondents have done, for example, at page 11 of their Brief), we reiterate that *as between the parties to this Petition for Certiorari*, this case is a labor dispute. This proposition is self-evident and needs no amplification. The fact that certain other rights or duties may be involved, or other parties joined as defendants, does not detract from the basic nature of the controversy between the company and the union organizers and employees.

Respondents argue that the holding of the Court of Appeals below is entirely consistent with *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959), and they desperately try to fit this case into one of the exceptions to *Garmon* which have been previously carved out by this Court. This attempt fails utterly, however, because the present case simply does not contain either the element of overriding state interest or the element of lack of fair representation, which would justify avoidance of the administrative agency charged by Congress with the responsibility of regulating labor disputes. Simply stated, this Court has never recognized a "civil rights" exception to the pre-emption doctrine.

The attempted unionization of an employer's plant is squarely protected by federal labor law and is directly within the domain of the NLRB. The purpopse of and

justification for the pre-emption doctrine was stated by this Court in *Vaca v. Sipes,* 386 U. S. 171, 180-81 (1967) to be:

> "The need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose."

The Court of Appeals' decision below is totally antithetical to the Congressional purpose and to the *raison d'etre* of the pre-emption doctrine.

It is very significant that all the approved exceptions to the *Garmon* doctrine to date have had their origin in this Court. This is as it should be. If there is to be an exception for the type of lawsuit brought by Respondents here, it should be sanctioned only after due deliberation by this Court of the merits of this case. For this reason, as acknowledged by Respondents, this case is of such proportion and importance as to require the attention and consideration of this Court.

In addition, this case presents a seeming conflict between two federal statutes, one enacted in 1871 to protect the rights of Negroes, and one passed in 1935 to secure the rights of employees. Yet Respondents, defying the repeated admonitions of this Court that labor disputes should be committed to the competence of the NLRB, expressly ask this Court to let stand the Court of Appeals' approval of the use of concurrent, parallel—and perhaps inconsistent—federal remedies. Respondents evidently contend that there is no way in which the two statutes can be reconciled, short of overlapping adjudications. This is a myopic view, for there are numerous civil rights disputes which in no way involve labor relations.

The potential ramifications of the judgment of the Court of Appeals, if sustained, are astounding. Astute labor

counsel could completely and effectively circumvent the National Labor Relations Board in virtually every instance of an alleged employer unfair labor practice, merely by filing suit in federal court and asserting that the employer's actions were taken "under color of state law."

Moreover, an even more disturbing possibility arises from the fact that Respondents below have contended that the "state action" requirement is no longer applicable to civil rights actions and that individual wrongdoing can be redressed in the federal courts. If this position is ever sustained, then every unfair labor practice charge could be referred to federal court, for the same basic reasons that Respondents are asserting jurisdiction in this case—deprivation of freedom of speech, freedom of association and/or due process of law. Certainly Respondents' "civil rights" argument could be made with reference to interference with organizational activities under §§ 7 and 8(a)(1); interference with the formation of a union under § 8(a)(2); discrimination based on speech or organizational activity under § 8(a)(3); discrimination based upon the giving of testimony or filing of charges under § 8(a)(4); or any refusals to bargain under § 8(a)(5). Thus, since all organizational and union activities have some "civil rights" overtones, the federal courts could be inundated with employee complaints which properly belong before the Labor Board.

In the interest of brevity, we have refrained from commenting on most of the inaccurate statements and editorial license contained in Respondents' Brief, including their attempt (p. 4) to amend the Complaint at this late date.

However, one particularly grievous error cannot pass unmentioned. At page 21 of their Brief, Respondents purport to quote from 29 U. S. C., § 523, which is part of

the Labor Management Reporting and Disclosure Act of 1959. In such quotation, Respondents omitted the language italicized below:

> ". . . except as explicitly provided to the contrary, nothing *in this chapter* shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any state."

Obviously, the limitations to "this chapter" refer to the 1959 Act and not to the National Labor Relations Act. This is confirmed by the "Historical Note" following § 523, which indicates that "this chapter" means Public Law 86-257, which is the Reporting and Disclosure Act of 1959.

CONCLUSION

The exception to the pre-emption doctrine created by the Court of Appeals in this case is the only judicially-created exception made by any court other than the United States Supreme Court. Because of the potential significance of such an exception and the possible emasculation of the National Labor Relations Board which could eventuate from the Court of Appeals' decision, this Court should grant the Petition for Certiorari and consider this matter on its merits.

Respectfully submitted

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